

§ 1325(a) (3)  
good faith  
BAP opinions as precedent

State of Oregon v. Selden Civ. No. 90-902-PA  
In re Selden Case No. 389-32535-H13

10/26/90                      PA - affirming                      Published (121 B.R. 59)  
   J. Hess

On appeal of the bankruptcy court's confirmation of debtor's chapter 13 plan, creditors argued that the debtor had not filed the plan in good faith. Judge Panter affirmed.

In determining good faith under § 1325(a)(3), the court reviews the totality of the circumstances. The court held that, if a debtor meets the disposable income requirements of § 1325(b), the fact that the debtor proposes a low percentage repayment to creditors is not relevant in assessing good faith of a chapter 13 plan. A chapter 13 debtor's attempt to discharge debts that would be nondischargeable in a chapter 7 case by proposing substantially low repayments of those debts under a chapter 13 plan is a fact to be considered in the good faith analysis; there is no need to impose on the debtor an especially heavy burden to show good faith.

The court held that bankruptcy courts are not bound by BAP decisions originating in another district.

Judge Panter agreed with the bankruptcy court that the facts of the case did not support a finding that the plan had been proposed in good faith.

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CLERK, UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

BY [Signature]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re:

LAURIE ANN SELDEN

Debtor-Appellee

STATE OF OREGON, HIGHER  
EDUCATION ASSISTANCE FOUNDATION  
and HEMAR INSURANCE CORPORATION  
OF AMERICA,

Appellants,

v.

LAURIE ANN SELDEN,

Appellee.

Case No. 389-32535-H13

OPINION

Civ 90-902-PA

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1 - OPINION

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P90-42(13)

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14 PANNER, J.

15 Appellants Oregon State Scholarship Commission, Hemar  
16 Insurance Corporation of America, and Higher Education  
17 Assistance Foundation (objecting creditors) appeal the  
18 bankruptcy court's order confirming debtor Laurie Anne  
19 Selden's (debtor) chapter 13 plan. Appellants contend the  
20 bankruptcy court erred in finding that debtor filed the plan  
21 in good faith and failed to follow controlling precedent in  
22 making that determination. I have jurisdiction under  
23 28 U.S.C. § 158. I affirm.

#### 24 BACKGROUND

25 On June 6, 1989, debtor filed a petition for chapter 13  
26 protection and a chapter 13 plan. Debtor is a Multnomah  
County deputy district attorney. Debtor borrowed  
approximately \$42,500 in student loans from the objecting

1 creditors for attending law school. Debtor has no secured or  
2 priority unsecured claims. The student loans are general  
3 unsecured claims.

4 Debtor is a single parent of two children. Her net  
5 monthly income from her deputy district attorney position at  
6 the time of the confirmation hearing was \$1,683. The chapter  
7 13 plan provides that debtor will pay the trustee \$140 per  
8 month for 36 months, giving the general unsecured creditors  
9 dividends of about 4%. The plan requires debtor to file  
10 quarterly income and expense reports with the trustee and  
11 objecting creditors. Debtor must also pay the trustee any  
12 income tax refunds received during the life of the plan.

13 On August 8, 1989 and January 23, 1990, objecting  
14 creditors filed objections to debtor's plan, contending that  
15 it was not in good faith as required by 11 U.S.C.  
16 § 1325(a)(3). The bankruptcy court held a confirmation  
17 hearing on January 23, 1990. On May 18, 1990, the court  
18 issued an order and supporting opinion confirming the plan  
19 with modifications.

#### 20 STANDARDS

21 The district court acts as an appellate court when  
22 reviewing a bankruptcy court judgment. Daniels-Head & Assoc.  
23 v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819  
24 F.2d 914, 918 (9th Cir. 1987). Findings of fact are reviewed  
25 under the clearly erroneous standard and conclusions of law de  
26 novo. Id.

1 DISCUSSION

2 The objecting creditors contend that the bankruptcy court  
3 applied the wrong standard to determine good faith.

4 I. Good Faith Determination

5 Section 1325 requires the bankruptcy court to confirm a  
6 chapter 13 plan if "the plan has been proposed in good faith  
7 and not by any means forbidden by law." 11 U.S.C.  
8 § 1325(a)(3). In determining good faith, the court reviews  
9 the totality of the circumstances, including "whether the  
10 debtor has misrepresented facts in his plan, unfairly  
11 manipulated the Bankruptcy Code, or otherwise proposed his  
12 Chapter 13 plan in an inequitable manner." Goeb v. Heid (In  
13 re Goeb), 675 F.2d 1386, 1390 (9th Cir. 1982); see also Downey  
14 Sav. & Loan Assn v. Metz (In re Metz), 820 F.2d 1495, 1498  
15 (9th Cir. 1987)(applying totality of the circumstances test to  
16 determine good faith).

17 Section 1325's good faith requirement is frequently  
18 litigated, perhaps because of the term's vagueness. See  
19 Nelson v. Easley (In re Easley), 72 Bankr. 948, 950 (Bankr.  
20 M.D. Tenn. 1987)(more than 300 reported "good faith"  
21 decisions, some with nearly identical facts producing  
22 inconsistent results). The presence of student loans in  
23 chapter 13 plans has added to the long list of good faith  
24 decisions. Nelson, 72 Bankr. at 953 n.4 ("[e]specially  
25 confusing are the student loan cases").

26 / / /

1           Objecting creditors contend the bankruptcy court erred in  
2 its good faith analysis when it refused to consider the low  
3 percentage repayment to objecting creditors and the fact that  
4 the debt is nondischargeable under chapter 7. Objecting  
5 creditors cite additional error due to the court's refusal to  
6 follow a Ninth Circuit Bankruptcy Appellate Panel (BAP)  
7 decision on this issue.

8           The bankruptcy court noted that it must make its good  
9 faith determination "in light of all militating factors."  
10 Oregon State Scholarship Comm'n v. Selden (In re Selden), 116  
11 Bankr. 232, 234 (Bankr. D. Or. 1990)(quoting Goeb, 675 F.2d at  
12 1390)(emphasis in original). The court also noted that under  
13 Goeb, substantiality of the proposed repayment is a relevant  
14 factor. Id. However, the bankruptcy court held that 1984  
15 amendments to the Bankruptcy Code eliminated the amount of the  
16 proposed repayment from its good faith determination. Id. at  
17 234-35.

18           A. 1984 Amendments

19           In 1984 Congress amended section 1325 to include  
20 subsection (b), incorporating additional confirmation  
21 requirements. The statute now reads, in pertinent part:

22           (a) Except as provided in subsection (b), the court  
23 shall confirm a plan if-

24           . . . .

25                   (3) the plan has been proposed in good  
26 faith and not by any means forbidden by  
law;

          . . . .

1 (b)(1) If the trustee or holder of an allowed  
2 unsecured claim objects to the confirmation of the  
3 plan, then the court may not approve the plan  
4 unless, as of the effective date of the plan-

5 . . . .

6 (B) the plan provides that all of the  
7 debtor's projected disposable income to be  
8 received in the three-year period  
9 beginning on the date that the first  
10 payment is due under the plan will be  
11 applied to make payments under the plan.

12 11 U.S. C. § 1325.

13 Under the bankruptcy court's analysis, upon objection by  
14 the trustee or an unsecured creditor, it must examine whether  
15 the debtor has devoted all projected disposable income to the  
16 plan as required by section 1325(b)(1)(B). If the debtor has  
17 so dedicated her disposable income, the court proceeds to a  
18 good faith analysis, but the type of debt and percentage and  
19 length of repayment are not relevant to that inquiry.

20 The bankruptcy court's analysis is in accord with at  
21 least one commentator and one bankruptcy court. In In re Red,  
22 60 Bankr. 113, 116 (Bankr. E.D. Tenn. 1986), the court held  
23 that where the requirements of section 1325(b) are met, the  
24 fact that the plan results in a low percentage repayment is  
25 not relevant in assessing the good faith of the chapter 13  
26 plan. The court adopted a leading treatise's rationale that  
because subsection (b) specifically deals with ability to pay  
provisions, there is no longer any reason for the amount of a  
debtor's payments to be considered as part of the good faith  
/ / /

1 standard. Id. (citing 5 L. King, Collier on Bankruptcy para.  
2 1325.04[3] (15th ed. 1985)).

3 At least one bankruptcy court and one bankruptcy  
4 appellate panel have rejected this approach. In In re Hale,  
5 65 Bankr. 893, 895 (Bankr. S.D. Ga. 1986), the court declined  
6 to follow Red. In Red, the plan was not confirmable because  
7 the debtor also failed the disposable income test under  
8 subsection (b), so the court's interpretation of good faith  
9 factors was dictum. Hale, 65 Bankr. at 895. Furthermore,  
10 Hale found that by passing section 1325(b)(1)

11 Congress established a minimum effort requirement  
12 for debtors. This did not dispose of the need for  
13 an analysis as to whether that minimum effort  
14 results in a meaningful repayment to creditors, an  
15 essential element of good faith under existing case  
16 law.

17 Id.

18 The Ninth Circuit BAP also rejected the contention that  
19 the amendment, due to its specificity, displaced the need to  
20 examine the debtor's prebankruptcy conduct in a good faith  
21 analysis. Fidelity & Cas. Co. of New York v. Warren (In re  
22 Warren), 89 Bankr. 87, 93 (Bankr. 9th Cir. 1988). Instead,  
23 the court found that even when a debtor meets the "best  
24 efforts" test of subsection (b), the amount of the proposed  
25 repayment, the proposed length of the plan, and the  
26 nondischargeability of the debt under chapter 7, are all still  
relevant factors in determining good faith. Id. at 93-95.  
The BAP also found that the debtor's burden of proving good

1 faith is "especially heavy" in a "superdischarge" situation.<sup>1</sup>  
2 Id. at 93.

3 B. The Correct "Good Faith" Standard

4 Objecting creditors argue that the insignificant amount  
5 of the proposed repayment, combined with the fact that  
6 debtor's "bankruptcy serves absolutely no purpose except to  
7 discharge non-dischargeable [chapter 7] debt", indicate that  
8 debtor did not file the plan in good faith, even though the  
9 bankruptcy court found that debtor devoted her disposable  
10 income to the plan in accordance with section 1325(b)(1). See  
11 Selden, 116 Bankr. at 231, 236-37.

12 However, objecting creditors fail to see that Congress  
13 placed the disposable income test in its own subsection and  
14 not in the subsection containing the good faith requirement.  
15 This fact, in addition to the specificity of subsection (b)  
16 compared with the more general language in subsection (a),  
17 indicates that Congress considered these analyses separate and  
18 distinct. I agree with the bankruptcy courts for the District  
19 of Oregon and the Eastern District of Tennessee, that once the  
20 court finds that debtor meets the requirements of section  
21 1325(b), the fact that the plan results in a low percentage  
22 repayment is not relevant in assessing the good faith of the  
23 chapter 13 plan. The bankruptcy judge did not err as a matter  
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26 <sup>1</sup>. A repayment plan under chapter 13 allowing discharge of  
debt potentially nondischargeable under chapter 7 is known as a  
"superdischarge". See, e.g., Warren, 89 Bankr. at 88.

1 of law in rejecting consideration of these factors in the good  
2 faith analysis.

3 C. BAP decisions as binding authority

4 Objecting creditors argue that the Ninth Circuit BAP  
5 decision in Warren is binding on the bankruptcy court even  
6 though it originated in the Central District of California.  
7 They argue that the court was not free to ignore the  
8 "especially heavy" burden on debtor to prove good faith, or  
9 the substantiality of repayment and character of debt in its  
10 good faith analysis.

11 BAP decisions arising from another district in the  
12 circuit are not binding on this bankruptcy court. Appeals  
13 from bankruptcy court decisions go either to BAPs or district  
14 courts. Appeals from BAP or district court decisions go to  
15 the Ninth Circuit Court of Appeals. Thus, BAPs and district  
16 courts are equivalents in the bankruptcy appeal process.

17 Because a bankruptcy court is not bound by decisions from  
18 other districts, it should not be bound by BAP decisions  
19 originating in another district. See, e.g., In re Junes, 76  
20 Bankr. 795, 797 (Bankr. D. Or. 1987), aff'd on other grounds,  
21 99 Bankr. 978 (Bankr. 9th Cir. 1989); see also Bank of Maui v.  
22 Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir.  
23 1990) (noting that several other courts have found BAP  
24 decisions not controlling on the circuit as a whole but  
25 refusing to reach the issue in the particular case); but see  
26 In re Windmill Farms, Inc., 70 Bankr. 618, 621 (Bankr. 9th

1 Cir. 1987)(suggesting that one reason for establishing the BAP  
2 was to provide a uniform and consistent body of bankruptcy law  
3 throughout the entire circuit and therefore, BAP decisions  
4 must be binding on each district in the Ninth Circuit), rev'd  
5 on other grounds, 841 F.2d 1467 (9th Cir. 1988).

6 The court in Warren apparently imposed the especially  
7 heavy burden because debtors will use chapter 13 to evade  
8 debts not discharged under chapter 7. Warren, 89 Bankr. at  
9 94; see also In re Wall, 52 Bankr. 613, 615-16 (Bankr. M.D.  
10 Fla. 1985). However, Congress has allowed debts to be  
11 discharged in chapter 13 cases that would otherwise be  
12 nondischargeable. Section 1328(a) provides that upon  
13 completion of the plan, the court shall enter a discharge of  
14 all debts except for those provided under sections 1322(b)(5)  
15 and 523(a)(5). 11 U.S.C. § 1328(a). This section appears to  
16 have been intended to encourage the use of Chapter 13 by  
17 debtors. Requiring an especially heavy burden of proof  
18 penalizes debtors who are utilizing a statute passed for their  
19 benefit. See In re Adamu, 82 Bankr. 128, 130 (Bankr. Or.  
20 1988), aff'd, No. 88-513 (D. Or. August 2, 1988 Opinion and  
21 Order).

22 The BAP's legitimate concerns regarding the possibility  
23 that chapter 13 debtors will evade debts not dischargeable in  
24 chapter 7 by proposing substantially low repayments of such  
25 debts under chapter 13, are properly addressed under the good  
26 / / /

1 faith analysis. There is no need to require an especially  
2 heavy burden of proof.

3 II. The Finding of Good Faith

4 Objecting creditors argue that debtor proposed her plan  
5 in bad faith because she "recklessly incurred debt she could  
6 not pay", she failed to disclose receipt of child support  
7 payments in her original plan, and she made numerous clothing  
8 and electronic stereo equipment purchases prior to filing.  
9 Additionally, objecting creditors argue that the plan should  
10 not be confirmed because all of debtor's disposable income is  
11 not devoted to the plan.

12 The bankruptcy court applied the "totality of the  
13 circumstances" test to determine debtor's good faith. Selden,  
14 116 Bankr. at 234. I find that the bankruptcy court's finding  
15 of good faith is not clearly erroneous.

16 The fact that during law school, debtor hoped to become a  
17 deputy district attorney and incurred student loans without  
18 inquiring into such an attorney's salary, does not indicate  
19 she "recklessly incurred debt she could not pay." Debtor was  
20 eligible for the loans at the time of receipt and objecting  
21 creditors did not require debtor to estimate her future  
22 salary. The bankruptcy court found that the facts supported  
23 the debtor's testimony that she fully intended to repay the  
24 loans at the time she borrowed the money. Id. at 237 n.6.

25 The bankruptcy court also found that the debtor's  
26 explanation for omitting the child support payment was

1 credible and satisfactory. Id. at 236. The court noted that  
2 one father's residence is unknown and debtor has not heard  
3 from him in years. At last account the father was a  
4 chemically dependent alcoholic facing extradition to another  
5 state on felony charges. The debtor sought the assistance of  
6 the Support Enforcement Division of the State of Oregon to  
7 collect the obligation without success.

8 The debtor's omission of child support from Kim Walters,  
9 whose paternity has never been established and who voluntarily  
10 pays support, was included in an amended budget. Debtor  
11 believed that because the support was not taxable as income,  
12 it was not includable as income for chapter 13 purposes. The  
13 bankruptcy judge found debtor's explanation for the omission  
14 was credible. Id. This finding was not clearly erroneous.

15 The court also found that the debtor's prefiling  
16 purchases did not evidence bad faith because they were  
17 insignificant. Id. at 238. I agree. Finally, the court  
18 determined that debtor did devote all of her disposable income  
19 to the plan. See Id. at 231, 236-37. The only item the court  
20 found necessary to adjust was debtor's projected expense for  
21 heat. Id. at 236-37. The court adjusted the expense  
22 accordingly.

23 The bankruptcy court's findings regarding the debtor's  
24 failure to disclose receipt of child support payments in her  
25 original plan, her prefiling purchases, and her projections of  
26 disposable income, were not clearly erroneous. A reviewing

1 court should not lightly disturb a factfinder's conclusion,  
2 especially when the factfinder is applying a totality of the  
3 circumstances test, described by one court as the "smell  
4 test." Easley, 72 Bankr. at 955.

5 CONCLUSION

6 I affirm the bankruptcy court's judgment.

7 DATED this 26 day of October, 1990.

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10 OWEN M. PANNER, United States  
11 District Court Judge  
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